

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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In re:

CRABAR BUSINESS SYSTEMS CORPORATION  
and WITT PRINTING COMPANY,

Case No. 01-12174  
Chapter 11  
(Jointly Administered)

Debtors.  
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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

**MEMORANDUM DECISION**

The issue before the court is the standing of the Official Unsecured Creditors' Committee ("Committee") of Debtor Deferiet Paper Company, Inc. ("Deferiet") to object to the sale of the property of Debtors Crabar Business System Corporation ("Crabar") and Witt Printing Company ("Witt"). The court has jurisdiction over this core proceeding pursuant to 11 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(N) and 1334(b).

### **Facts**

The Committee represents the creditors of Deferiet, an entity related to Crabar and Witt. The parent company for all three is Debtor Crabar Paper and Allied Products Corporation ("Parent Corporation"). Crabar and Witt do not owe the Committee's members any money for services provided or goods sold. There are allegations by the Committee that it might have claims against Crabar and Witt based on commingling of funds and voidable transfers, but it has not commenced an adversary proceeding against either of them to recover any property. After the hearing on the motions to sell had already occurred, the Committee filed an application for permission to pursue recovery actions in the Deferiet case against the Parent Corporation and some of Deferiet's labor attorneys pursuant to 11 U.S.C. §§ 547 and/or 548.

Both Crabar's and Witt's unsecured trade creditors were paid at the beginning of their cases pursuant to a court order dated May 14, 2001. Deferiet, Crabar and Witt are all borrowers under the Credit Agreement with BT Commercial Corporation ("BTCC") and other lenders (together, the "lending group").

In its limited objection to sale, the Committee urged the court to deny the sale because all proceeds would go to the lending group with nothing remaining for the two estates. According to its papers, since the proposed sales would not generate funds for the estates, Deferiet's

creditors had no opportunity to recover on their alleged claims against the Parent Corporation. The Committee did not challenge the pricing, terms of sale or business reason for it.

BTCC responded to the Committee's objection, asserting that the Committee had no standing to object to the sale and alleging the objection was a frivolous attempt to extort cash from estates that had no liability to it. It further asserted that the Committee completely ignored the fact that BTCC and the other lenders provided all of the post petition financing that paid virtually all of Crabar's and Witt's prepetition and post petition creditors. According to BTCC, the only remaining creditor in these two cases is the lending group itself.

After a chambers conference, the parties agreed that \$20,000 of the sales proceeds would be held in escrow while the court decided the Committee's standing to object to the sale. Both the Committee and BTCC submitted a memorandum of law on the standing issue.

### **Arguments**

The Committee relies primarily on *International Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744 (2d Cir. 1991). In comparing the facts of that case to the ones in the instant cases, it alleges, "here the consolidated debtors and the shareholders of Crabar Paper and Allied Products Corporation, also in Chapter 11, are all represented by the same law firm and have all agreed to the secured parties' proposals in exchange for an Order releasing them from their personal guaranty, and are not seeking to protect other creditors of the estate." (Memorandum of Law in Support of the Standing of the Official Unsecured Creditors' Committee of Deferiet Paper Company, Inc. to Pursue Limited Objections to Sale under 11 U.S.C. §363 ("Committee Memorandum") p. 2.) It argues the only way to reconcile *International Trade* with a prior Second Circuit determination that a mortgagee did not have standing to challenge a lift stay is to

view them from the perspective of whether an active fiduciary exists. The Committee submits that the *International Trade* holding grants standing to adversely affected entities when the fiduciary is not acting for the benefit of creditors generally.

The Committee also cites on *In re Coram Healthcare Corp.*, 271 B.R. 228 (Bankr. D. Del. 2001). In drawing its analogy, the Committee alleges, “Upon information and belief, the secured creditors have agreed to release David Paulus and the Craig Johnson estate from a deficiency claim now estimated to exceed \$10,000,000.” (Committee Memorandum p. 3.) It then asks, “If \$1,000,000 a year was sufficient to taint Coram Healthcare Corp., should not a release in excess of \$10,000,000 raise a question in this Court of who, if anyone, is acting for the benefit of creditors at large?” (Committee Memorandum p. 3.) It goes on to state, “This lack of concern for fiduciary duties prompted the DeFeret Committee to ask the Court to intervene and bring a \$500,000 preference action that the debtor should have brought but failed to do.” (Committee Memorandum p. 3.)

BTCC, on the other hand, relies on the “prior” Second Circuit decision the Committee had cited, *In re Comcoach Corp.*, 698 F.2d 571 (2d Cir. 1983). It attacks the Committee’s reliance on *International Trade*, pointing out that the issue in that case was the mortgagee’s standing to appeal a bankruptcy court order, not standing to contest the bankruptcy matter in the first instance. According to BTCC, the Committee does not meet section 1109(a)’s “party in interest” requirement.

The Debtors did not file a memorandum of law. They did, however, file a letter dated June 12, 2002. In that letter, the Debtors’ attorney strongly objects to the Committee’s allegation regarding the law firm’s representation of both the Debtors and the shareholders of the Debtors.

The attorney calls the allegation “unfounded” and asserts that the Committee’s characterization of the Debtors’ principals’ release should be viewed “with suspicion.”

### **Discussion**

As both sides recognize, standing is one of the threshold issues in every federal case. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). “In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Id.* To that end, Bankruptcy Code § 1109 is entitled “Right to be heard” and explicitly provides, at subsection (b), “A party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.” Standing to bring the motion to sell lies with the trustee/debtor in possession. 11 U.S.C. §§ 363(b) and 1107.

As found above, the Committee is neither a creditor nor the “creditors’ committee” in either of these cases. That does not necessarily mean, however, that it is not a “party in interest” who could oppose the sales. When interpreting the meaning of “party in interest,” courts in the Second Circuit are governed by the Code’s purposes. *In re Comcoach*, 698 F.2d at 573. “[T]he party asserting standing must show he is a beneficiary of the bankruptcy provision he invokes.” *In re Martin Paint Stores*, 199 B.R. 258, 263 (Bankr. S.D.N.Y. 1996), *aff’d*, *Southern Blvd., Inc. v. Martin Paint Stores*, 207 B.R. 57 (S.D.N.Y. 1997).

In pursuing their motions to sell, the goal that Crabar and Witt seek is liquidating their estates and paying their remaining creditor, the lending group. The Second Circuit has even recognized liquidation and payment as one of the key purposes of the Bankruptcy Code itself. *In re Comcoach*, 698 F.2d at 573 (citations omitted). The Committee’s bare allegation that it

“might have” a cause of action against them or their principals does not persuade the court that it therefore has standing to object to the sales.

The Committee’s plight is not unlike that of the non creditor mortgagee in *In re Comcoach*. In *Comcoach*, the bank whose standing was challenged was a mortgagee and the mortgagor leased the property with the mortgage to the debtor. *In re Comcoach*, 698 F.2d at 572. After the mortgagor stopped making the mortgage payments, the bank started a foreclosure proceeding. *Id.* The debtor, a tenant in possession, was not included in the proceeding although the state law provided that lessees were necessary parties. *Id.* at 572, 574. Arguing the automatic stay barred the proceeding, the bank filed a motion to lift stay so that it could include the debtor in the foreclosure proceeding and comply with the state law requirements; it also argued that if it could not pursue the debtor in state court, it was left without a remedy to enforce its rights under the mortgage. *Id.*

The Second Circuit addressed each of the bank’s concerns. Noting that if the debtor was not made a party to the state foreclosure proceeding the debtor’s rights would remain unaffected, the court concluded the state court action could go forward without violating the stay. *Id.* at 574. Although the debtor appeared to be the only source of income from the property, the court stated the bank could pursue its right to have a receiver appointed and that a receiver would qualify as a party in interest for purposes of section 362(d) if the debtor did not pay rent. *Id.*

Although the Committee might successfully obtain a recovery judgment against the Parent Company, its collection efforts may very well prove fruitless, similar to the bank’s potential recovery against the mortgagor/lessor when the debtor/lessee was not paying rent. However, to permit a creditor’s creditor to have standing to object to a liquidating sale on the

grounds that the estate and the equity holder (i.e., the objector's creditor) is not receiving any proceeds does not meet the "claim against the debtor or the estate" test that the Second Circuit articulated in *Comcoach* since the Committee does not have a right to payment against Crabar or Witt or their estates. *Id.* On the other hand, the Parent Company may have a claim, thus, it would have standing to object. However, it has not, which leads to the Committee's attempt to compare its situation to what it believes were the predicaments the courts were trying to remedy in the *International Trade* and *In re Coram Healthcare Corp.* cases.

*International Trade* is inapposite. The issue the Second Circuit considered was not standing with regard to a pending bankruptcy matter, it was standing to appeal a bankruptcy court order where the appellant, a creditor of the debtor, was not a party to the underlying motion to extend the time to assume or reject a lease. *International Trade*, 936 F.2d at 746-747. In deciding that the appellant had standing to appeal, the court focused on the "person aggrieved" test it had set forth in an earlier decision, *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985). As for the appellant's standing regarding the underlying motion, the Bankruptcy Code provides that only the trustee can file the motion to extend. *Id.* at 747; 11 U.S.C. § 365(d)(4). However, it is undoubtedly without question that the bankruptcy court properly entertained the appellant's support of the trustee's motion since it was a creditor, thus, the broader "interested person" test was met.

The court fails to see how *International Trade* is availing to the Committee. Although the trustee in that case did not appeal the bankruptcy court's denial of his motion to extend the time to assume or reject, the Second Circuit did not find or even suggest that the trustee acted inappropriately. *Id.* at 746. It applied the "person aggrieved" test and after finding the bank was

an entity “directly and adversely affected pecuniarily” by the bankruptcy court’s order denying the extension, it concluded the bank had standing to appeal. *Id.* at 747. To this court, the Second Circuit did a straight application of the test for determining standing to appeal; it does not appear that the trustee’s decision not to appeal helped shape its determination.

*In re Coram Healthcare Corp.* is equally unavailing and inapposite. In that case, the matter before the bankruptcy court was confirmation of the debtor’s second plan; it did not involve standing. *In re Coram Healthcare Corp.*, 271 B.R. at 230. The bankruptcy court was indeed troubled by the debtors’ CEO’s conflict of interest in having an employment contract with one the debtors’ largest creditors; it discussed, at length, the duty of loyalty owed by him, particularly in pursuing avoidance actions. *Id.* at 234-237. Here, however, the Committee has put nothing before the court, other than the allegations contained in its memorandum of law, which would at least lend itself to a finding on par with the “actual conflict of interest” and “possible harm to the debtors” determinations the Delaware bankruptcy court made before denying confirmation. *Id.* Moreover, the issues before the other bankruptcy court were entirely different from the standing issue presently before this court, despite the Committee’s attempted analogy.<sup>1</sup>

## **Conclusion**

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<sup>1</sup>The court notes that if the Committee had overcome the standing issue, its next hurdle would have been convincing the court that although all of the creditors, except the lending group, in both cases have already been paid, each estate would still be entitled to receive some of the proceeds in order for the sales to take place in this forum. Thus, the question of how equity holders would be entitled to any money before all creditors, including the lending group, have been fully paid is left for another day.

The Committee does not have standing to challenge the Debtors' motions to sell.

Dated:

Albany, NY

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Honorable Robert E. Littlefield, Jr.  
United States Bankruptcy Judge